IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 4:05-cv-00329-GKF-PJC
	)	
TYSON FOODS, INC., et al.	)	
	)	
Defendants.	)	

DEFENDANT TYSON FOODS, INC.'S REPLY TO STATE OF OKLAHOMA'S RESPONSE IN OPPOSITION TO DEFENDANT TYSON FOODS, INC.'S MOTION TO MODIFY FEBRUARY 26, 2007 PROTECTIVE ORDER PROHIBITING THE DEPOSITION OF ATTORNEY GENERAL W.A. DREW EDMONDSON

Defendant Tyson Foods, Inc. ("Tyson"), respectfully replies to State of Oklahoma's Response in Opposition to Defendant Tyson Foods, Inc.'s Motion to Modify February 26, 2007 Protective Order Prohibiting the Deposition of Attorney General W.A. Drew Edmondson [Dkt # 1921], and states as follows:

I. INTRODUCTION

Plaintiffs characterize Attorney General Drew Edmondson's ("Edmondson") involvement in the Locust Grove E-Coli Outbreak as a fulfillment of his statutory duty as Attorney General for the State of Oklahoma. They claim his independent investigation and numerous public accusations against Tyson and other poultry companies related to the Locust Grove E-Coli Outbreak were merely intended to keep the public informed of the actions and work performed by his office. As such, Plaintiffs claim those actions could not transform Edmondson into a fact witness for the case, and further, that he has no direct personal factual information pertaining to his investigation to warrant taking his deposition rather than utilizing

the Rule 30(b)(6) deposition procedure recognized by this Court. This rationale is misguided. Edmondson, the Attorney General, is using the cover granted by his title to manufacture otherwise missing evidence for use by Edmondson, the Plaintiffs' attorney in his lawsuit against Tyson. Plaintiffs call Tyson's refusal to accept and embrace this slight of hand "illogical." Tyson calls Plaintiffs' attempt at cleverness gamesmanship that should not be condoned by this Court.

The fact that Plaintiffs would like to designate someone other than Edmondson to try to explain why he commissioned an investigation by his office, why he believes his office is more competent to investigate public health matters than the Oklahoma Department of Health, and why he publicly accused Tyson of causing one man's death and sickness in hundreds of others is curious, but an insufficient reason to deny Tyson's request to depose Edmondson. Edmondson's independent investigation of the Locust Grove E-Coli Outbreak overstepped the duties of his office, and his public comments, going beyond his duty to inform the public, were unbecoming of an attorney involved in this lawsuit. Edmondson has unique personal knowledge relevant to the manufacturing of evidence that he will attempt to offer at the trial of this matter, and Tyson should be permitted to depose him on the limited issue of the Locust Grove E-Coli Outbreak.

II. ARGUMENT

Plaintiffs' response provides this Court with no basis to deny Tyson the ability to depose Edmondson about the investigation conducted by his office and the remarks he chose to make repeatedly in newspapers read by jurors who may be called upon to decide his lawsuit against Tyson and the other poultry companies. His title as Attorney General and his claim that he was discharging a duty to inform the public do not insulate him from discovery. Similarly, his status as one of many lawyers representing Oklahoma in this litigation is not a bar to deposition

because he has unique, personal knowledge about the circumstances surrounding the investigation he commissioned and his public remarks which Tyson cannot discover through other means.

A. Edmondson's Status as a Public Official Does Not Prevent Him From Being Deposed

In their response, Plaintiffs cite two cases which they claim stand for the proposition that the Attorney General has a duty to keep the public informed of his official actions. *See* Plaintiffs' Response, at 9 (citing *Hultman v. Blumenthal,* 787 A.2d 666, 674 (Conn. App. 2002); *Gold Seal Chinchillas, Inc. v. State of Washington*, 420 P.2d 698, 701 (Wash. 1966)). Neither case involved the question of whether an Attorney General is subject to depositions. Both cases, interestingly, involve defamation suits filed against state attorney generals and whether the attorney generals' statements were privileged. Plaintiffs cite this case for the court's descriptions of an attorney general's duties, but pay little attention to the court's warnings against an overzealous attorney general. Though an attorney general's speech is privileged, there are limitations. The court in *Gold Seal Chinchillas* noted that, "Our determination that the Attorney General is absolutely privileged in this respect does not open the floodgates for irresponsible state official action to libel maliciously opponents or people who would thwart or frustrate official desires and aims...The allegedly libelous publication or oral pronouncement must have some relation to the general matters committed by law to the control or supervision of the particular state official."[1] 420 P.2d 698, 701. The concurring opinion further articulated concerns particularly relevant to the issues at hand:

[1] Though Gold Seal Chinchilla dealt with defamation, a similar principle has been applied in cases seeking the deposition of a high government official. See *Coleman v. Schwarzenegger* (E.D.Cal. 9-15-2008) (stating "Plaintiffs cite to several district courts that have allowed depositions to proceed against high-ranking officials. The Court discerns three themes in these

> [T]he Attorney General is not required by law to issue press releases, but I agree that it can be inferred that he has a duty to keep the public informed about the activities of his office. Since his office initiates litigation on behalf of the state, it would seem that he has a duty, or at least a right to keep the public informed concerning the nature of the litigation which he instigates.
>
> On the other hand, we have Canon 20 of the Canons of Professional Ethics, which reads:[2]
>
> > Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the courts and otherwise prejudice the due administration of justice. Generally they are to be condemned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An *ex parte* reference to the facts should not go beyond quotation from the records and papers on file in the court; but even in extreme cases it is better to avoid any *ex parte* statement.
>
> I do not think that this canon should be overlooked in any discussion of the Attorney General's rights and duties in a case of this nature. He is the lawyer for the state, a most powerful and influential client. Consequently, he should be particularly mindful of the harm that may befall an opponent in litigation if his exercise of the privilege to disseminate information is abused. And I believe that the opinion of the court in this case should make it clear that the right or duty to inform the public concerning the Attorney General's performance of his duties does not include a license to make gratuitous statements concerning the facts of the case or disparaging the character of other parties to an action.

Id. at 701-02. There is not an issue of defamation in Tyson's Motion; rather, the issue is whether Edmondson has personal knowledge relevant to this case. The passages quoted above stand to show that there are limits to General Edmondson's actions and that at times, an attorney general can overstep his role and lose the protections granted to a person in his position. The attorney general's duty to inform the public is not a license to speak freely on issues affecting a case in

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cases. First, courts have allowed depositions when there are allegations that the official acted with improper motive or acted outside the scope of his official capacity (citations omitted)."). Though improper motive in these cases typically involve more than trying to get the upper hand in a lawsuit, Edmondson arguably acted outside the scope of his official capacity as defined in 74 Okla. Stat. 18b(A)(1)-(3) through his investigation of the Locust Grove E-Coli Outbreak.

[2] *See* Oklahoma Rule of Professional Conduct 3.6.

which he is also an attorney. Rather, "he should be particularly mindful of the harm that may befall an opponent in litigation if his exercise of the privilege to disseminate information is abused." With this noted, Tyson returns to its belief that General Edmondson has direct personal information regarding this investigation.

B. Edmondson Has Unique Personal Knowledge of the Investigation

Plaintiffs' main argument is that other means exist for Tyson to obtain the information sought through the deposition of Edmondson, namely, through the use of Rule 30(b)(6) depositions. The false premise in Plaintiffs' argument is that Tyson simply seeks information "regarding the scientific facts that underlie the experts' conclusion that the Country Cottage well is, and has been, contaminated with poultry waste and associated bacteria, and that it is possible that the well and its poultry-waste-contaminated groundwater was the source of the outbreak." Plaintiffs' Response, at 8. Tyson knows well and has deposed several times the "experts" that Edmondson chose to involve in this "investigation" of the E-Coli outbreak. They are the same experts that Tyson has deposed on similarly flawed scientific analysis in this case. Tyson does not desire to depose Edmondson about how to read a lab sheet. Tyson is interested in discovering facts known only to Edmondson about why this investigation was commissioned, why he felt it necessary to circumvent the role of other environmental and public health agencies, and why he made inflammatory and unsubstantiated public accusations against Tyson related to the E-Coli Outbreak. These sorts of questions cannot be answered by another deposition of one of the experts hired by his outside counsel in this case or by a Rule 30(b)(6) designee "for the State" selected by Edmondson from agencies such as ODEQ or the Oklahoma Department of Health.

Plaintiffs refer the Court to Exhibit 6 in Tyson's Motion, the internal memorandum created by Edmondson's Environmental Protection Unit. The findings shown in this exhibit, Plaintiffs allege, if offered at trial, would be offered through experts and state witnesses, and not by Edmondson himself. Edmondson, they claim, did not collect any samples, interview witnesses, conduct any test, analyze any laboratory results, or research any records. He, therefore, would not have any personal information regarding the investigation. Plaintiffs, however, have failed to discuss the other exhibits. Exhibit 7 includes a PowerPoint presentation given by Edmondson when he produced his "findings." As noted in Tyson's Motion, this PowerPoint presentation can only be described as sensational and unbecoming of a government official. Many remaining exhibits, including composite Exhibit 9, contain newspaper articles detailing Edmondson's numerous remarks to the press. What all of these exhibits show is that Edmondson, using the power of his office, has embarked on a public campaign to tie the Locust Grove E-Coli Outbreak to the poultry industry. A scientist could testify about very limited issues regarding samples and tests. A random person from Edmondson's office or from another state agency designated in response to a 30(b)(6) notice could talk about the minor details of the investigation. Neither, however, would have the knowledge or authority to testify about why Edmondson commissioned this investigation and the campaign being operated publicly by Edmondson and his office against the defendants in this case.

Plaintiffs, though they feel they achieve some higher ground by refusing to confirm in writing what they have made clear in personal communications with defendants' counsel, consider the evidence derived from Edmondson's investigation relevant to this lawsuit. With that knowledge, Edmondson should be well aware, as stated in cases cited in his own court documents, that his improper actions could alter the protection normally granted an individual in

his position. He is a lawyer for the state and it bears repeating again that "he should be particularly mindful of the harm that may befall an opponent in litigation if his exercise of the privilege to disseminate information is abused."

III. CONCLUSION

For these reasons, and those previously given, this Court should grant Tyson's Motion to Modify the February 26, 2007 Protective Order to permit the deposition of Attorney General Drew Edmondson regarding his independent investigation of the Locust Grove E-Coli Outbreak.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 2nd day of April 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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